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BEFORE THE  
STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS

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Application of Daniel and Susan Tritz	)	
to Excavate Wetland and Construct a	)	Case No. 3-NC-95-2040
Reservoir and a Dike in the Town of	)	
Sigel, Wood County, Wisconsin	)	

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER  
APPROVING WATER QUALITY CERTIFICATION

Mr. and Mrs. Daniel Tritz, 5526 Highway 186, Vesper, Wisconsin 54489, filed an application with the Department of Natural Resources for water quality certification pursuant to 33 U.S.C. 1341, Section 401 of the Clean Water Act, and Chapter NR 299, Wis. Admin. Code. Certification was requested to excavate 4.3 acres of highly disturbed wetland to a depth of 25 feet for the construction of an 8-10 acre reservoir that would be used as a water source for cranberry production. The project would also include the construction of a dike measuring approximately 175 feet long and 70 feet wide at the base (40 feet wide on top), where it would cross the wetland. The project is located in the SE 1/4 of the NW 1/4 of Section 30, Township 23 North, Range 5 East, Town of Sigel, Wood County, Wisconsin.

The Department of Natural Resources issued a Notice of Water Quality Certification which stated that the certification would be granted 30 days from the date of publication of the notice unless a hearing was requested. A timely petition for hearing was received by the Department pursuant to sec. 227.42, Stats., from several interested parties.

Pursuant to due notice, a hearing was held on December 1, 1995, at Wisconsin Rapids, Wisconsin, Jeffrey D. Boldt, Administrative Law Judge (the ALJ) presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Daniel and Susan Tritz, by

Attorney William A. Metcalf  
480 E. Grand Avenue, P. O. Box 759  
Wisconsin Rapids, WI 54495-0759

Concerned Neighbors Association:  
Mr. and Mrs. Al Heiser;  
Mr. and Mrs. Daryl Friday;  
Mr. and Mrs. Roger Scheunemann;  
Mr. and Mrs. Wm. Brunner; and  
Mr. Jeff Heiser, by

Attorney Stephen E. Walczak  
214 W. Grand Avenue, Off. 23  
Wisconsin Rapids, WI 54495

Department of Natural Resources, by

Attorney Michael D. Scott  
P. O. Box 7921  
Madison, WI 53705-7921

#### FINDINGS OF FACT

1. Daniel and Susan Tritz, 5526 Highway 186, Vesper, Wisconsin, 54489 own real property located in the Town of Sigel in the SE 1/4, NW 1/4 of Section 30, Township 23 North, Range 5 East. The Tritz's filed a state/federal application dated May 26, 1995 for water quality certification pursuant to sec. 401 of the Federal Clean Water Act and Chapter NR 103 and 299, Wis. Admin. Code.

2. The purpose of the project is to construct a reservoir to facilitate the development of a cranberry operation. Four or more cranberry beds, totaling eight acres in size, would be built on upland areas of the Tritz property. Up to an additional ten beds may be constructed later, also on upland areas of the Tritz property. The eight-acre reservoir would be used to support the upland cranberry operation. Approximately 4.46 acres of highly disturbed wetlands which are now subject to cattle grazing will be affected by the proposed reservoir. Of the existing wetland area, .756 acres would be directly involved in the filling needed to construct a dam and dikes and an additional 3.704 acres would be excavated and flooded in wetland areas above the headwater of an unnamed tributary to Elm Creek. The reservoir would be used to flood the cranberry beds as needed to produce a marketable cranberry crop.

Construction would be undertaken in two stages. First, an area of approximately 8 acres would be excavated no deeper than elevation 1055. The second stage would be to construct an earthen dike across existing wetland area #3 (See: Ex.5), complete with bulkhead/stoplogs (elevation 1071) and emergency spillway (elevation 1070). The primary

spillway would be a 48" diameter aluminum culvert. The proposed water surface elevation of the reservoir is 1070.00. Embankment slopes would be protected by riprap.

3. Although cranberry growing requires substantial amounts of water, it is not a wetland dependent activity within the meaning of sec. NR 103.08(3)(a), Wis. Admin. Code because a reservoir used in aid of cranberry production does not need to be built on wetlands to fulfill its basic purpose.

4. Peter Wolter, Department of Natural Resources' Area Water Management Specialist, and Chris Knotts from the U.S. Army Corps of Engineers, conducted an assessment of the wetland functional values on April 6, 1995. The affected area of wetlands is included on the Wisconsin Wetland Inventory Map. It is a very poorly drained area consisting of veedum and silt loam soils. Vegetation at the site includes blue vervain, soft rush, water smartweed, boneset, various sedges and aster. Wolter assessed the functional value of floral diversity to be 0 to minimal in the wetland area due to heavy trampling and feeding by farm animals especially grazing cattle. A twenty year history of trampling has compacted the soil surface and inhibited growth of wetland plant species. Intensive cattle grazing at the site has all but denuded the site of wetland vegetation. (See: Exs. 7 & 8) The proposed reservoir would not have a significant detrimental impact on wetland vegetation or floral diversity values.

5. Wildlife habitat values would be little impacted by the proposal as the reservoir itself could be used by the same reptiles and amphibians that currently make use of the wetland area. There would be no impact on fish habitat as there is currently no standing water except for very brief periods of spring runoff. No fish are known to exist at the project site. DNR Area Wildlife Manager Joseph Haug opined that "...shallow, well-sloped ponds fenced from cattle use could actually enhance the wetland character of the property a great deal." (Ex. 16) The proposed project would not have a significant detrimental impact on wildlife habitat or fishery values.

6. Due to negative impacts by farm animals, the existing wetland has lost a significant amount of its ability to store flood water. It is expected that the reservoir would hold as much or more surface water as the existing wetlands and would serve the same purpose in preventing flooding from surface water runoff. (Wolter) Accordingly, there are no anticipated detrimental impacts to wetland flood water storage values if the project is constructed in accordance with the following Order. If the reservoir surface water elevation reaches 1070.0 feet, the applicants must remove stoplogs to prevent backing up of waters to the north.

7. The wetland was rated as having a low/medium significance for water quality protection. There are no shoreline areas in and around the project site and no navigable waters immediately adjacent to the project site. The few existing wetland plants do have a

value in helping to filter nutrients and improve water quality downgradient of the project site. Because emergent wetland species are likely to grow around the edges of the reservoir, the proposed project is not likely to have a significant detrimental impact on water-filtering which is attendant to growth of wetland plant species.

8. The objectors are understandably concerned about potential impacts to their drinking water and septic systems. All of the high-quality expert testimony indicates that there are likely to be no significant detrimental impacts to groundwater quantity or quality as a result of construction of the reservoir and dikes. The U.S. Army Corps Engineering Analysis concluded: "The two wells in the immediate area of the reservoir which are completed in the sandstone/shalerock unit, should not be impacted by the initial filling or under drought conditions." (Ex. 2) The same analysis concluded that there should be no impacts on neighboring residents' basement or mound system. The applicant's engineer Charles Gibbons Jr. and DNR District Groundwater Program Supervisor Archie Wilson reached the same conclusions. A clear preponderance of the evidence including all of the expert testimony indicates that the proposed project will not have a detrimental impact on groundwater or on other neighboring properties wells in the area.

The objectors also expressed concerns about chemical applications of herbicides and pesticides that are largely unrelated to the wetlands issues that give the DNR and the ALJ jurisdiction over this matter. While these issues are largely outside the scope of this decision, it is to be expected that the applicants will use any chemical treatments in a responsible manner that complies with all existing regulations on the use of such products. It would also make sense for the neighboring residents to have their well water tested so that a baseline measurement can be established should unanticipated problems arise. The record as a whole does not support a requirement for groundwater monitoring as a condition of granting water quality certification.

9. The project site area is a very low value wetland area for aesthetics. It is part of a pasture and barnyard for farm animals. Wolter assessed the aesthetics portion of the wetland functional value evaluation as being low. The proposal would not have a detrimental impact on wetland aesthetic values in the area.

10. A clear preponderance of the credible evidence, including all of the expert testimony, supports a finding that the proposed project will not have any significant adverse impacts on affected wetlands including any cumulative impacts attributable to the proposed project or potential secondary impacts on wetland functional values.

11. The proposed reservoir construction as currently proposed will not result in significant adverse impact to the functional values of the affected wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences if it is undertaken in conformance with the conditions set forth in the Order.

12. There was little testimony on the central issue of whether or not there were practical alternatives which will not adversely impact wetlands within the meaning of sec. NR 103.08(3)(b), Wis. Admin. Code. However, the proposed flooding and filling of wetland areas in the construction of the proposed reservoir will have little if any detrimental environmental consequences for the highly disturbed wetlands the applicants propose to flood and fill. At the request of the Department and the U.S. Army Corps of Engineers, the applicants have sought to limit the impact on wetlands by constructing the project on the highly disturbed grazing area rather than on other high quality forested wetlands on the property. Further, Mr. Tritz made inquiries into the alternative of purchasing another site for construction of the reservoir and found the cost to be \$88,000 to \$120,000. The ALJ finds this cost to be prohibitive given the relatively small scale of the proposed cranberry operation. Taken as a whole, a preponderance of the evidence supports a Finding that there are no other practical alternatives to location of the site as currently proposed.

13. The proposed project area is not in an area of special natural resource interest within the meaning of sec. NR 103.04, Wis. Admin. Code.

#### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification cases pursuant to sec. 227.43(1)(b), Stats., and sec. NR 299.05(b), Wis. Admin. Code.

2. The proposed project will not result in violation of the standards contained in sec. NR 103.08(3), Wis. Admin. Code in that no practical alternatives to the proposed project which will not adversely affect wetlands exist. The project will not result in significant adverse impacts to the functional values of the affected wetlands, significant adverse impacts to water quality or other significant environmental consequences.

3. The subject property is not located within "an area of special natural resource interest" within the meaning of sec. NR 103.04, Wis. Admin. Code.

4. The Department and the Division have authority pursuant to sec. NR 299.05, Wis. Admin. Code, to approve water quality certification if it is determined that there is reasonable assurance that the project will comply with the standards enumerated in sec. NR 299.04, Wis. Admin. Code. The applicants have demonstrated such assurances in the instant matter.

ORDER

WHEREFORE, IT IS HEREBY ORDERED, in accordance with the foregoing Findings of Fact and Conclusions of Law that water quality certification be granted subject to the following conditions:

1. The applicant must notify the DNR Area Water Management Specialist not less than 5 days before starting the project and again not more than 5 days after construction is complete.
2. The permittee shall allow free and unlimited access to the project site at any time to any employee of the DNR to inspect the project for compliance with the certification and other applicable laws.
3. The reservoir, dam and dike shall be constructed in accordance with the plans and specifications prepared by Lambert, Lee and Associates (Exhibit 5) and the U.S. Department of the Army, Corps of Engineers, Permit (Exhibit 3). Any amendments to said plans and specifications shall be approved by the Department of Natural Resources.
4. This permit may be rescinded or revoked if the Department determines that the conditions set forth above have not been followed or if it finds that the project results in unanticipated significant adverse impacts to the functional values of wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences.

Dated at Madison, Wisconsin on January 9, 1996.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By Jeffrey D. Boldt  
JEFFREY D. BOLDT  
ADMINISTRATIVE LAW JUDGE

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.